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IN THE

Supreme Court of the United States

October Term, 1958

No. 163

UNITED STATES STEEL CORPORATION,
Appellant,

v.

STATE OF WASHINGTON.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION OF BERKSHIRE HATHAWAY, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND PROPOSED BRIEF *AMICUS CURIAE*

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A local tax imposed for the privilege of doing business in a taxing state, and measured by gross receipts, is unconstitutional as repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States, when applied to a taxpayer whose only activity in the taxing state is the negotiation of sales of goods which are in, and which are delivered to the purchasers in, another state 9

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UNITED STATES STEEL CORPORATION,

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v.

STATE OF WASHINGTON.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

BERKSHIRE HATHAWAY, INC., respectfully moves for leave to file a brief *amicus curiae* in the above-entitled cause.

The consents of the attorneys for the parties were requested, but were refused on the ground that the relevant question saved in the Notice of Appeal is limited to apportionment, as stated therein, and that the proposed brief *amicus curiae* is not directed to that question. Inasmuch as the tax at issue is a state privilege tax measured by gross receipts from all sales, excepting those exempt under the Constitution of the United States, it is submitted that the point to which the proposed brief is addressed, namely, that the state is prohibited by the Commerce Clause from taxing the proceeds of separable interstate sales where the taxpayer's only activity within the taxing state in respect of such sales is the negotiation thereof, is a point of apportionment. In any case, it is submitted that the decision below, sustaining the tax on the proceeds of such interstate sales, represents a plain error this Court may wish to notice and correct.

The interest of Berkshire Hathaway, Inc., in this case arises from the fact that it is a party to a case about to be appealed to the Court of Appeals of the State of New York,[1] involving the New York City General Business and Financial Tax,[2] and raising the same issue deemed presented in the instant case, to wit, whether a taxpayer which maintains an office in a taxing state, through which office it negotiates sales of goods which are in another state, is subject to a tax imposed by the taxing state for the privilege of doing business therein and measured by the gross receipts from such sales, although the goods are delivered to the purchasers outside the taxing state, and although the taxpayer engages in no activities in the taxing state other than such negotiation of such sales.

In its brief filed in the instant case in the Supreme Court of the State of Washington, the State argued that this Court's *per curiam* decision in *Field Enterprises, Inc.* v. *State of Washington* (1956), 352 U. S. 806, 77 Sup. Ct. 55, 1 L. Ed. (2d) 39, which decision was on the authority of *Norton Co.* v. *Dept. of Revenue* (1951), 340 U. S. 534, 71 Sup. Ct. 377, 95 L. Ed. 517, governed and disposed of the instant case; and the Washington Court so held. In appellant's brief, on the other hand, it was not argued either

> (a) That the *Field* case is distinguishable from the instant case in that, in the instant case, deliveries were made outside the taxing state, by shipment f.o.b. at the purchasers' cost and risk, whereas, in the *Field* case, deliveries were made inside the taxing state, by shipment at the taxpayer-seller's cost and risk pursuant to contracts of sale so requiring (Rule 5, Section 63.04.200, Revised Code of Washington), or

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[1] *Berkshire Fine Spinning Associates, Inc.* v. *City of New York, et al.*, decided July 3, 1958, by App. Div., 1st Dept., N. Y. Law Journal, July 7, 1958, p. 2, not yet otherwise reported.

[2] Invalidated by this Court in *Joseph* v. *Carter & Weekes Stevedoring Co.* (1947), 330 U. S. 422, 67 Sup. Ct. 815, 91 L. Ed. 993, and *Gerosa* v. *United Piece Dye Works* (1955), 348 U. S. 916, 75 Sup. Ct. 298, 99 L. Ed. 718, as applied to interstate commerce.

(b) That the *Norton* case, while requiring the decision of taxability rendered by the Supreme Court of Washington in the *Field* case, wherein deliveries were made inside the state, required the opposite conclusion in the instant case, wherein deliveries were made outside the state.

In the Jurisdictional Statement herein, neither of those points is made, nor is it urged that the Commerce Clause prohibits a state privilege tax measured by gross receipts from sales of goods located and delivered outside the taxing state, where the activities of the taxpayer in the taxing state are limited to the negotiation of such sales.

Accordingly, said Berkshire Hathaway, Inc., apprehends that the error believed to have been committed by the court below, in its interpretation of the *Norton* and *Field* cases, may not be brought to the attention of this Court, and that the constitutional issues deemed raised by the instant case may not be fully briefed and presented to this Court, unless the proposed brief *amicus curiae* is received. In such brief, it is argued that the decision of this Court in the *Field* case has no bearing on the instant case, and that the Commerce Clause of the Constitution, together with the precedent of the *Norton* case and prior and subsequent decisions of this Court cited in said brief, indicate that the decision of the Supreme Court of Washington in the instant case should be reversed. If accepted, it is believed that said arguments are sufficient to dispose of the instant case.

If accepted, it is believed that said arguments will also dispose of said *Berkshire* case, *supra*, footnote 1, in a lower court, inasmuch as the contention made by the City of New York and accepted by the New York Appellate Division therein is that the *Norton* case, or, in any event, the *Field* case, overrules prior law and represents the enunciation by this Court of a new doctrine to the effect that the Commerce Clause does not prohibit a local privilege tax on the

gross receipts of a taxpayer which maintains an office in a taxing state, although the only activities of the taxpayer in the taxing state consist of the negotiation of sales of goods which are in, and which are delivered to the purchasers in, other states. In that case, two of the five Justices dissented, stating: "In the light of the history of the *Field* case before the Supreme Court, there is not sufficient basis for erecting, in the state courts, an entirely new set of principles with economic and legal ramifications unexpressed, to be implied only at the peril of great economic and governmental uncertainty."

Respectfully submitted,

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Dated: New York, N. Y.,
July 14, 1958.

IN THE

Supreme Court of the United States

October Term, 1958

No. 163

UNITED STATES STEEL CORPORATION,

Appellant,

v.

STATE OF WASHINGTON.

BRIEF OF BERKSHIRE HATHAWAY, INC., AS *AMICUS CURIAE*

The Interest of the *Amicus Curiae*

The interest of Berkshire Hathaway, Inc. (formerly Berkshire Fine Spinning Associates, Inc.), in this case arises from the fact that it is a party to a case about to be appealed to the Court of Appeals of the State of New York,[1] involving the New York City General Business and Financial Tax,[2] and raising the same issue as that deemed presented to the Court in the instant case; to wit, whether,

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[1] *Berkshire Fine Spinning Associates, Inc.* v. *City of New York, et al.*, decided July 3, 1958, by the New York Supreme Court, Appellate Division, First Department, N. Y. Law Journal, July 7, 1958, p. 2, not yet otherwise reported; same case below, CCH New York State Tax Reporter, Vol. 4, Para. 198-021, not officially reported.

[2] Invalidated by this Court in *Joseph* v. *Carter & Weekes Stevedoring Co.* (1947), 330 U. S. 422, 67 Sup. Ct. 815, 91 L. Ed. 993, and *Gerosa* v. *United Piece Dye Works* (1955), 348 U. S. 916, 75 Sup. Ct. 298, 99 L. Ed. 718, as applied to interstate commerce.

in view of the Commerce Clause of the Constitution, a taxpayer which maintains an office in a taxing state, through which office the taxpayer negotiates sales of goods which are in another state, for the purpose of introducing them into the taxing state, is subject to a tax imposed by the taxing state for the privilege of doing business therein and measured by the gross receipts from such sales, although the goods are delivered to the purchasers outside the taxing state, and although the taxpayer engages in no activities in the taxing state other than such negotiation of such sales across state lines.

Abbreviated Statement of the Case

The Washington tax involved in this case was imposed "* * * for the act or privilege of engaging in business * * * upon every person engaged within this state in the business of making sales at retail * * * [or] * * * at wholesale * * *," it was measured by "* * * the gross proceeds of sales * * *," and it excluded from the tax base "* * * amounts derived from business which the state is prohibited from taxing under * * * the Constitution or laws of the United States." (RCW, Secs. 82.04.220, 82.04.250, 82.04.270, 82.04.430(6).)

Appellant (or its predecessor), a Delaware corporation with principal office in California, was qualified to do business in Washington, and had an office there. The Washington office served as headquarters for appellant's salesmen, who solicited orders from Washington customers and turned in the orders to the Washington office. Employees at that office investigated and determined the credit of the prospective customers, and forwarded the orders to appellant's out-of-state plants to be filled with goods located out-of-state. The goods were delivered, and title passed, out-of-state, by shipment f.o.b. at the customers' cost and risk. Payment was made, at the customers' election, to appel-

lant's Washington or out-of-state offices. Appellant maintained a bank account in Washington, in which payments there received were deposited; and delinquent Washington accounts were pursued by the Washington office, which also received complaints and made recommendations for settlement, but no decisions in that regard.

Appellant neither operated nor maintained any local outlet, store, plant, factory, warehouse, other place of business, or stock of goods in Washington, except that, partly in a rented warehouse, and partly on consignment, it kept a small quantity of one of its numerous items of iron and steel products; to wit, wire rope, in the state. About 1¼% of appellant's total sales to Washington customers consisted of sales of such wire rope; but the tax on the proceeds of those sales is conceded to have been proper, and is not in issue here. Only about 2¼% of appellant's total sales to Washington customers consisted of other sales of wire rope; and substantially none of appellant's wire rope customers were customers for its other products, sales of which made up between 96½% and 97% of its total sales to Washington customers.

Thus, apart from the aforesaid local sales of part of its wire rope, which sales, as stated, are not in issue here, and were dissociated from appellant's other business, appellant's sole and only activity in the State of Washington consisted of the negotiation of sales of goods which were in, and which were delivered to the purchasers in, other states.

The Supreme Court of Washington sustained the tax on the gross proceeds of all of appellant's sales to Washington customers.

Summary of Argument

Prior to the decision of this Court in *Norton Co.* v. *Dept. of Revenue* (1951), 340 U. S. 534, 71 Sup. Ct. 377, 95 L. Ed. 517, the law seemed clear that the channeling of orders through a local office in a taxing jurisdiction did not deprive otherwise interstate transactions of the protection of the Commerce Clause, or subject the proceeds of sales of goods so ordered to local privilege taxes measured by the gross receipts from such sales, where the goods were located outside, and were delivered to the purchasers outside, the taxing jurisdiction, and where the activities of the local office, and of the taxpayer in the taxing jurisdiction, were limited to the negotiation of such sales.

Neither the decision of this Court in the *Norton* case, *supra*, nor its subsequent decision in *Field Enterprises, Inc.* v. *State of Washington* (1956), 352 U. S. 806, 77 Sup. Ct. 55, 1 L. Ed. (2d) 39, varied that rule. On the contrary, the *Field* case does not involve the point; and both the *Norton* case itself and this Court's subsequent denial of certiorari in *Gerosa* v. *United Piece Dye Works* (1955), 348 U. S. 916, 75 Sup. Ct. 298, 99 L. Ed. 718, indicate that the rule continues in force without change.

Accordingly, the tax asserted against appellant herein by the State of Washington violates the Commerce Clause of the Constitution; the decision below, upholding that tax, is erroneous; and that decision should be reversed.

ARGUMENT

A local tax imposed for the privilege of doing business in a taxing state, and measured by gross receipts, is unconstitutional as repugnant to Article I, Section 8, Clause 3, of the Constitution of the United States, when applied to a taxpayer whose only activity in the taxing state is the negotiation of sales of goods which are in, and which are delivered to the purchasers in, another state.

It is confidently submitted as firmly established that the solicitation, in a taxing jurisdiction, of sales of goods which are in, and which are delivered to purchasers in, other states is not a sufficient activity to serve as the basis for a local privilege tax; and, at least until this Court's decision in the *Norton* case, *supra*, it seemed equally well established that the rule applied with equal force where the seller maintained an office in the taxing jurisdiction to which his solicitors reported, and through which the orders they obtained were transmitted.

> *Cheney Bros. Co.* v. *Mass.* (1918), 246 U. S. 147, 38 Sup. Ct. 295, 62 L. Ed. 632;
> *Alpha Portland Cement Co.* v. *Mass.* (1925), 268 U. S. 203, 45 Sup. Ct. 477, 69 L. Ed. 916.

Assiduous tax collectors, however, have seized upon the *Norton* case as overruling prior authority and enunciating a new doctrine: that the existence of a local office through which orders may be transmitted represents a local activity sufficient to support a privilege tax, although the goods are located and delivered outside the taxing state, and although the taxpayer's only activity in the taxing state is the negotiation of such sales. Further, the subsequent decision of this Court in the *Field* case, *supra*, is declared to have removed any possible doubt that such is the effect

of the *Norton* case, and definitely to have fixed and established the asserted new doctrine.

Thus, in its brief before the Supreme Court of the State of Washington herein, the State asserted, of the *Norton* case, and without limitation by reference to Norton's local activities in Illinois: "The United States Supreme Court held that all of Norton's sales were subject to the tax where its local office had been utilized *either* in receiving the orders *or* in distributing the goods to the purchasers."

Again, in its brief before the New York Appellate Division, in the above-mentioned case in which this *amicus curiae* is a party, the City of New York argued that if Norton's local activity lent credence to the suggestion that it was that activity that was the decisive point in that case, at least it was clear that the *Field* case laid down the unequivocal rule that the existence of a local office engaged actively, albeit exclusively, in the negotiation of sales of goods located and delivered in other states, is sufficient to support a local privilege tax on the gross receipts from such sales. Three of the Justices of the Appellate Division (a majority) accepted this contention, and held the *Field* case dispositive of the issue, although the other two Justices dissented, stating: "The decision of the Supreme Court in *Field Enterprises* v. *State of Washington* (352 U. S. 806) presents a problem. * * * If the *Field* case affirmance means all that it potentially means, then the *United Piece Dye Works* case [supra] was wrongly decided, despite the denial of certiorari by the Supreme Court. * * * Before, however, the state courts should effect so drastic a reversal of position, it would seem wiser to await a clearer direction from the Supreme Court. In the light of the history of the *Field* case before the Supreme Court, there is not sufficient basis for erecting, in the state courts, an entirely new set of principles with economic and legal ramifications unexpressed, to be implied only at the peril of great economic and governmental uncertainty."

Finally, in the instant case, the Supreme Court of Washington rested its decision on the authority of the *Norton* and particularly the *Field* cases, stating: "* * * the sales activities of the Seattle office of appellant are decisive factors in establishing and holding the local market for its goods. Thus it is subject to the tax."

It is the purpose of this brief to present the view (a) that the *Norton* case not only does not decide that the existence of a local office engaged exclusively in negotiating sales across state lines renders intrastate otherwise interstate sales, but, on the contrary, affirmatively holds that even where there are also extensive plainly local activities, the proceeds of sales negotiated in the taxing jurisdiction, but not generated by the local activities, may not be included in the tax base when the goods are located and delivered outside the taxing jurisdiction; (b) that the *Field* case is wholly inapplicable here because its *ratio decidendi* is that Field, in addition to maintaining a local office, also made local delivery of its goods; and (c) that, as indicated by this Court's denial of certiorari in *Gerosa* v. *United Piece Dye Works*, *supra*, the post-*Norton*, as well as the pre-*Norton*, rule is that where the only activity of a taxpayer in a taxing state is the negotiation of sales of goods which are in, and which are delivered to purchasers in, other states, the Commerce Clause renders him immune to local privilege taxes, whether or not he maintains a local office.

It is submitted that the above-mentioned contentions of the State of Washington and the City of New York, and the decisions of the court below herein, and of the New York Appellate Division, are erroneous in that they fail to distinguish between the services Norton's Illinois branch rendered to customers, on the one hand, and such services as appellant's Washington office rendered to appellant, on the other. The one were plainly local in character; but the other were as plainly integral component parts of interstate commerce.

Norton, a Massachusetts corporation, authorized to do business in Illinois, therein operated and maintained a warehouse and retail store where it regularly made sales over the counter of the (about 3,000 items of) goods carried in stock in its local warehouse, and also received and transmitted orders for certain other goods not carried in stock in Illinois. In addition, Norton locally served customers by physically servicing and repairing machines, after sale. The local office further served Illinois purchasers of goods not carried in local stock by combining orders and arranging for their shipment in carload lots, at reduced freight rates, to the local office, thereafter making local distribution and delivery. In sum, Norton's Illinois branch provided customers with all the conveniences and services a purely local establishment would have supplied.

Norton made four classes of sales to Illinois customers:

> *One*: Sales over the counter at the retail store of goods carried in stock in Illinois. These were conceded and held to be taxable.
>
> *Two*: Sales of goods not carried in stock in Illinois, shipped into the state on orders channeled through the local outlet, and delivered locally. A unanimous Court held these sales taxable.
>
> *Three*: Sales of goods not carried in stock in Illinois, shipped into the state directly to customers on orders channeled through the local outlet, where delivery was made outside the state. In the absence of a showing that these orders were not generated by the conveniences and services rendered locally to customers, and on the basis that one who asserts his rights to the benefits of an exemption must prove his case, the Court, with one Justice dissenting, held these sales taxable.
>
> *Four*: Sales of goods not carried in stock in Illinois, shipped into the state directly to customers

on orders not channeled through the local outlet, where delivery was made outside the state. With three Justices dissenting, the Court held these sales exempt from the tax.

In the instant case, appellant, for its own purposes, and for its own convenience, maintained a Washington office, through which its solicitors transmitted the orders they obtained; but, although this may have represented a service rendered by appellant to itself, it did not constitute a service to customers. Unless in respect of its sales of wire rope, which were dissociated from the bulk of its business, appellant's Washington office did not provide local services or conveniences to customers. Customers' contacts were with appellant's solicitors; and whether appellant's solicitors forwarded orders to appellant's out-of-state plants by one route or another, could have been of no moment to the customers. The maintenance and activities of appellant's Washington office were not, therefore, factors, decisive or otherwise, in establishing or holding its Washington market. It was the activities of appellant's solicitors that generated appellant's sales to inhabitants of Washington; and therefore those sales were in all essentials comparable to the fourth, and not the third, class of Norton's sales to Illinois customers.

Thus, the *Norton* case, far from furnishing authority for taxing appellant's sales, constitutes the strongest authority for exempting them, for Norton carried on local activities of great relative magnitude, whereas appellant did not.

That the foregoing view of the meaning and effect of the *Norton* case is correct, and that the above-mentioned interpretation of the *Norton* case urged by the State of Washington, urged by the City of New York, and adopted by the Supreme Court of Washington in its opinions in the *Field* case and the instant case, is erroneous, is, we submit, apparent on analysis of the *Norton* case itself. Beyond that,

however, this Court denied certiorari, and by that denial affirmed the decision of the Court of Appeals of the State of New York, in *Gerosa* v. *United Piece Dye Works, supra.*

The *Dye Works* case came to this Court after its decision in the *Norton* case had been rendered, and it presented precisely the question presented in the instant case: whether the existence and activities, in the taxing jurisdiction, of an office actively, but exclusively, engaged in negotiating sales of goods (services) located and delivered outside the taxing jurisdiction would suffice as the foundation on which to base a local privilege tax. The New York court held that the Commerce Clause prohibited the tax; and this Court, with its recent *Norton* decision before it, denied certiorari.

It may be urged by the proponents of the asserted new doctrine that this Court's action in the *Dye Works* case was only a denial of certiorari; and that, if the fact that most of Norton's activities in Illinois were local beclouds the purity of that decision's presentation of the asserted new rule, at least this Court's *Field* decision establishes that rule beyond the peradventure of any further doubt. But we submit that this contention also is erroneous, and that its error resides in a failure to give consideration or effect to the factor we deem to have been decisive in the *Field* case, and which distinguishes the *Field* case from the instant case.

It is true that Field's office in Washington was engaged only in soliciting sales of goods located in another state, and it is true that Field maintained no local store or outlet in Washington; but the factor that is ignored is that it was in Washington that Field delivered all its goods sold to Washington customers.

The Washington court, in its opinion in the *Field* case, accorded the point no apparent weight; but the fact nevertheless was that all of Field's sales to Washington customers were made under contracts requiring Field to prepay the cost of transportation. Thus, under the provisions

of the Uniform Sales Act (Rule 5, Sec. 63.04.200, RCW), title did not pass until delivery to the customers in Washington. Although Field shipped its books from out-of-state directly to its Washington customers, all shipments were at Field's cost and risk, and the books were Field's books until they were delivered to the purchasers in Washington.

On the basis of the fact that this Court's decision in the *Field* case was *per curiam*, and without opinion, except as the *Norton* case was cited, the proponents of the alleged new doctrine attempt to assimilate the *Field* case to that part of the *Norton* decision that dealt with the third class of Norton's sales—those generated by the local services. But Field rendered no local services: and, in our view, it is plain that the portion of the *Norton* decision that in fact governed the *Field* case was the portion that dealt with the second class of Norton's sales—those of goods shipped into the state on order, but delivered locally.

We submit that, although the decision of the Washington court in the *Field* case was right, and was required by the *Norton* case, that court's reasons for its decision, as expressed in its opinion, were wrong; and we submit further that the fact that this Court affirmed the decision of the Washington court indicates no approval of the reasoning of that state tribunal. Accordingly, we urge that the *Field* case does not touch or involve the issue presented in the instant case; we submit that the *Field* decision does not in anywise vary the rule that the Commerce Clause forbids a local privilege tax based on the negotiation in a taxing state, whether or not through a local office therein, of sales of goods located and delivered outside the state.

Conclusion

We respectfully advance the conclusion that (a) the law before the *Norton* case was that the negotiation in a taxing state of sales of goods located and delivered in another state is not an activity sufficient to support a privilege tax; (b) that such was the law whether or not an office, whose activities were limited to such negotiation, was maintained in the taxing state; (c) that the *Norton* case did not change, but, on the contrary, confirmed, that rule; (d) that the *Dye Works* case further confirmed it; (e) that the *Field* case does not involve the point, and is irrelevant; and (f) that the law existing today, and applicable to the instant case, is that the negotiation in a taxing jurisdiction of sales of goods located and delivered in another state is not an activity that will support the imposition of a local privilege tax, whether or not an office, whose activities are limited to such negotiation, is maintained in the taxing jurisdiction.

Article I, Section 8, Clause 3, of the Constitution of the United States prohibits the tax asserted against appellant; the decision below was erroneous; and that decision should be reversed.

Respectfully submitted,

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